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IN THE

Supreme Court of the United States

COMMITTEE FOR ENVIRONMENTALLY SOUND DEVELOPMENT, INC., NORTH RIVER COMMUNITY ENVIRONMENTAL REVIEW BOARD, WEST VILLAGE COMMITTEE, COALITION FOR A LIVABLE WEST SIDE, GEORGIO CAVAGLIERI, JOHN L. BUNCH, JR., PHYLLIS GUNTHER, HARRIET WEISSBERGER and OLIVE FREUD,

Petitioners,

v.

THE CITY OF NEW YORK, RUDOLPH GIULIANI, as Mayor of The City of New York, THE METROPOLITAN TRANSPORTATION AGENCY and TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the lower court erred in denying plaintiffs the opportunity to file a proposed second amended complaint, by prejudging the substantive merits of the amended claims, rather than their facial adequacy, in violation of the relaxed pleading standard of *Conley v. Gibson* and Rule 12, thereby subverting the fundamental concept of notice pleading.

2. Whether the lower court erred in failing to provide proper *de novo* review of the facial adequacy of the proposed amended claims, by stubbornly failing to recognize intervening changes in the underlying facts and law, despite repeated notice of these changes.

3. Whether the lower court improperly limited the scope of citizen suits, by erroneously affirming the district court's finding that Section 4.4 of New York's 1992 Clean Air Act plan for carbon monoxide does not contain a "specific strategy" as required, when an intervening change of fact and law made the Fourth Claim clearly adequate.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Committee for Environmentally Sound Development, Inc., has no parent company and does not issue stock.

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Petitioners respectfully seek a writ of certiorari to review the judgment of the Second Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Second Circuit is unpublished (*Committee for Environmentally Sound Development, Inc., et al. v. The City of New York, et al.*, No. 99-7403 (2d Cir. Dec. 21, 1999)), but can be found at Appendix A ("App. A"). The district court opinion is also unpublished (*Committee for Environmentally Sound Development, Inc., et al. v. The City of New York, et al.*, No. 98 Civ. 272 (S.D.N.Y. Dec. 1, 1998)), but can be found at Appendix B ("App. B").

STATEMENT OF JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on December 21, 1999. The Court of Appeals entered an order denying a timely petition for panel rehearing on February 11, 2000 ("App. C").

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The primary statutes involved in this case are the federal Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq.*, specifically § 7604, the CAA citizen suit provision; Federal Rules of Civil Procedure 12(b)(6) and 15(a); and the 1992 New York State Carbon Monoxide State Implementation Plan ("1992 CO SIP"). The relevant portions of these provisions can be found at App. D.

STATEMENT OF THE CASE

This case concerns the proposed redevelopment of the area currently occupied by the New York Coliseum, located on the "superblock" bounded by West 58th Street, West 60th Street, Ninth Avenue and Columbus Circle in New York City. Plaintiffs are individuals, and community organizations representing individuals, who allege that they will be adversely impacted by alleged increases in carbon monoxide ("CO") levels caused by, or in the vicinity of, this redevelopment project, which includes two 750 foot towers rising from a base of 2.5 million square feet; a 650,000 square foot commercial condominium; world headquarters of Time Warner; 325,000 square feet of retail space; 325 condominium units; a 425 room hotel, and other amenities.

The Clean Air Act ("CAA"), 42 U.S.C. § § 7401 *et seq.*, requires the United States Environmental Protection Agency ("EPA") to promulgate national ambient air quality standards ("NAAQS") for various pollutants. Each State then determines how to achieve and maintain these standards by devising a State Implementation Plan ("SIP"). *See* 42 U.S.C. § 7410. The citizen suit provision of the CAA creates a private right of action to enforce the Act's provisions. A citizen may bring a suit to enforce, *inter alia*, a specific provision of an applicable SIP. *See* 42 U.S.C. § 7604; *see also Wilder v. Thomas*, 854 F.2d 605, 613 (2d Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989). New York State's current CO SIP was promulgated in 1992 and replaced a SIP promulgated in 1984. The 1992 SIP specified, at that time, the use of environmental impact statements ("EISs") to evaluate projects that may significantly impact air quality, *see Coalition Against Columbus Ctr. v. City of New York*, 967 F.2d 764, 767 (2d Cir. 1992); and provided for a broader

procedure for evaluating potential CO exceedances, or "hot spots," to be "triggered by a request from New York State for redesignation of New York City" as having reached attainment of the CO standard. App. B at 12a-14a.

Petitioners filed their complaint in January 1998 alleging violations of the CAA and a New York City land use provision, N.Y. City Charter § 197-c, based upon alleged exceedances of the CO NAAQS ("CO standard") in the vicinity of the site that would be caused or exacerbated by vehicular traffic to and from this huge redevelopment project. An amended complaint followed in February 1998. In an unpublished opinion and order, the district court concluded pursuant to Fed. R. Civ. P. 12(b)(6) that plaintiffs had failed to state a federal claim upon which relief could be granted, and therefore declined to exercise supplemental jurisdiction over the state law claims. The court permitted petitioners to submit a proposed amended complaint that "should identify, separately, each specific strategy or commitment in New York's SIP alleged to be violated and describe," with "some particularity," how the City's compliance with the provision was deficient. Thereafter, the Court would decide whether leave to amend should be granted.

In December 1998, petitioners filed a proposed amended complaint identifying defendants' violations of sections 4.0(2) and 4.4 of the 1992 SIP. As to the latter, Section 4.4 of the 1992 SIP declares in relevant part that:

> The State and City commit to develop a *broader alternative procedure* to identify potential areas at risk of exceedance of the CO standard, *taking into account a wider database, consistent with all relevant methodologies, including: modeling,*

> *data collection and growth projection.* This new procedure will become part of the CO Maintenance Plan which must be submitted at the time that the State requests redesignation of the nonattainment area as an area which has attained the NAAQS for CO.

App. A at 5a (emphases added).

In an unpublished opinion and order dated March 9, 1999, App. B, the district court denied plaintiffs leave to amend their complaint, concluding that the proposed amendments did not state a claim upon which relief could be granted. As for § 4.4, the court held, *inter alia*, that the City's obligation under the Section to develop "a broader alternative procedure to identify potential areas at risk of exceedance of the CO standard" is "a future one, which is triggered by a request from New York State for redesignation of New York City" as in attainment for CO. Petitioners could not and did not allege that the "triggering" had even occurred. App. B at 14a. The court accordingly denied petitioners' motion to amend their complaint and dismissed the case.

After all briefing in the Second Circuit was complete, counsel for non-City defendants brought to the Second Circuit's attention the filing by the State of "New York State Implementation Plan: Carbon Monoxide Redesignation Request and Maintenance Plan for the New York Metropolitan Area," dated August, 1999 ("CO Redesignation Request"), by letter dated September 29, 1999, filed pursuant to Fed. Rule of Appellate Proc. 28(j), attaching thereto a copy of the CO Redesignation Request.

At oral argument on the appeal, petitioners reminded the court about the State's recent, post-briefing filing of the CO Redesignation Request. Petitioners argued that the Redesignation Request "triggered" the broader procedure for evaluation of potential CO hot spots upon study of traffic data collection and growth projections. Thus, the City's blind acceptance of the project proponent's EIS, lacking such information, was no longer legally sufficient because the "broader alternative procedure" of identification of "potential areas at risk of exceedance of the CO standard" was in effect. Thus, the district court's then correct finding that such a broader procedure was *not* then in effect, because it could only be "triggered by a request from New York State for redesignation of New York City as a 'nonattainment' area,' " had become incorrect due to subsequent events.

After summarizing the district court's opinion, the Court of Appeals noted in its decision following oral argument that the appropriate standard in its review of the dismissal is "as if the amended complaint had been filed and then subjected to review under Fed. R. Civ. P. 12(b)(6)," citing *Wilder*, 854 F.2d at 613. The reviewing court further noted the standard that "a district court's dismissal of a complaint pursuant to Rule 12(b)(6) is reviewed *de novo*," citing *Sykes v. James*, 13 F.3d 515, 518-19 (2d Cir. 1993). Despite the intervening event brought to the Court's attention prior to its decision, the court concluded that it "agree[s] with the judgment of the district court *for substantially the same reasons* stated in its opinion and summarized above," which included the absence of the "triggering event" (emphasis added). Without further discussion on those subjects, the court then discussed

1. The Court reproduced the district court's error, using "nonattainment," where the State's request was to be redesignated from nonattainment to "attainment" status.

two arguments raised by petitioners but not addressed by the district court.

On its petition for panel rehearing, which was denied, petitioners again stressed the importance of this intervening change -- the CO Redesignation Request as the "triggering event" of the broader procedure for evaluating CO hot spots — that occurred after briefing was completed.

In that Redesignation Request, just as it had bound itself in the 1992 SIP, the State declared the City would have to take all the steps of the broader procedure — including undertaking traffic studies and reviewing predicted growth indicators — which resembled the predictions for the broader procedure as envisioned in the 1992 CO SIP.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeals' dramatic departure from this Court's clear directives regarding relaxed pleading standards, liberal grant of amendments to pleadings and *de novo* review of complaints form a three-pronged assault on this Court's established fundamental procedural rules protecting litigants. The lower court's grievous errors are particularly devastating to environmental citizen suit plaintiffs challenging New York's most powerful economic and political interests, as in this case — Time-Warner, along with one of the City's most aggressive developers, strongly backed by Mayor Rudolph Giuliani and a $360 million price tag. Citizen plaintiffs' ability to make such challenges have already been limited by this Court's more sharply drawn rules on standing and mootness in recent years. Failure of this Court to reverse in this case would convince citizen suit plaintiffs of this Court's indifference to their concerns.

Here, at the same time that the City and State of New York ardently back the development project under challenge here, they have since 1992 been bound by federal law to employ a "broader alternative procedure," namely, a whole new panoply of detailed studies to identify carbon monoxide hot spots starting in August 1999. This significant and dispositive change in federal law, in effect prior to the lower court's decision, should have dispelled any remaining doubts about the facial adequacy of petitioners' proposed amended complaint. The interests of justice now mandate reversal of the district court's dismissal of the complaint.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS IS IN GROSS CONFLICT WITH RELEVANT DECISIONS OF THIS COURT MANDATING RELAXED PLEADING STANDARDS, LIBERALLY GRANTED AMENDMENTS TO COMPLAINTS, AND *DE NOVO* REVIEW BY APPEALS COURTS OF THE ADEQUACY OF COMPLAINTS. (Questions 1 and 2)

The Court of Appeals erred in denying plaintiffs the opportunity to file a proposed second amended complaint, by prejudging the substantive merits of the amended claims, rather than their facial adequacy, in violation of the relaxed pleading standard of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), and Rule 12, Fed. R. of Civ. P. Moreover, the Court of Appeals' refusal to allow amendment of the complaint subverts this Court's long-standing directives regarding liberal leave to amend complaints (Fed. R. Civ. P. 15(a)),

and a reluctance to grant motions to dismiss for failure to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)). In addition, petitioners were entitled to a true *de novo* review of the facial adequacy of their proposed amended complaint, especially the Fourth Claim, given the supervening change in the underlying facts — namely, the triggering of the imposition of a federal mandate applying a broader procedure for review of the potential of proposed projects to cause CO hot spots.

There was ample evidence upon which to allow petitioners to amend their complaint and develop their case on the merits. This denial has deprived petitioners of the proper protection that this Court has accorded those rules.

A.

Rule 15(a) of the Federal Rules of Civil Procedure provides that when leave of court is required to amend a complaint, such "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15. This Court has held that "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Courts have exercised a pervasive liberality in allowing amendment under Rule 15(a), in recognition of the axiomatic principle that "controversies should be decided on merits whenever practicable." *United States v. New York*, 82 FRD 2 (N.D.N.Y. 1978); *see, e.g., Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964).

Here the question of leave to amend is guided by the standards of Federal Rule of Civil Procedure 12(b)(6) ("Rule

12(b)(6)"). This rule allows parties to move for dismissal of a complaint when that complaint fails to state a claim upon which relief can be granted. Rule 12(b)(6). This Court has directed that "a complaint should not be dismissed [on this basis] unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. at 45-46. This Court has further cautioned that an inquiry under Rule 12(b)(6) is a limited one because the decision is made "before the reception of any evidence either by affidavit or admissions." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Thus, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Scheuer*, 416 U.S. at 236.

Liberal leave to amend complaints and reluctance to grant motions to dismiss for failure to state a claim are closely intertwined doctrines. They are both a direct reflection of the tenet that parties should be permitted to present their claims on the merits and not upon a mere notice pleading. This is a concept fundamental to our system of justice. "[T]he purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. at 48.

Because the "triggering event" for the broader procedure for identification of CO hot spots had taken place, and was brought to the Court of Appeals' attention prior to its decision, petitioners were entitled to develop evidence in discovery to demonstrate that the City had failed to take the steps required in the broader alternative procedure for CO hot spot identification, and offer it in support of their Fourth Claim. Plaintiffs should have been permitted to do so even

if it "appear[ed] on the face of the pleading that a recovery is very remote and unlikely," for "that is not the test." *Scheuer*, 416 U.S. at 236.

Accordingly, the lower court's decision undermines this Court's clear directive regarding liberal pleading and reluctance to dismiss complaints, something that is particularly important in citizen suits, where important societal concerns are at stake.[2]

B.

The Court of Appeals also grievously erred in failing to provide proper *de novo* review of the facial adequacy of the proposed amended complaint, given the intervening change in the underlying facts and law, namely, the Redesignation Request that triggered an expanded procedure to identify potential CO hot spots. Like this Court's relaxed pleading standard and liberal amendment of complaint standard, *de novo* review gives plaintiffs a second bite at the apple and requires a reexamination by the appeals court of the adequacy of the complaint, especially in a citizen suit, as if the complaint had in fact been filed, and then "subjected to review under Fed. R. Civ. P. 12(b)(6)" by that reviewing court. *Wilder*, 854 F.2d at 613; *Sykes v. James*, 13 F.3d 515, 518-19 (2d Cir. 1993). Though those cases and that principle were cited with approval by the Court of Appeals in this case, App. A at 3a, 6a, the standard was not, in fact, applied by the Second Circuit.

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2. "Citizen suits are an important aspect of the CAA enforcement scheme." *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976); *see also Natural Resources Defense Council, Inc. v. Train*, 166 U.S. App. D.C. 312, 5120 F.2d 692, 699-700 (D.C. Cir. 1974).

As noted, in August 1999, the State of New York made the Redesignation Request to EPA; that triggered the obligation in § 4.4 of the 1992 CO SIP, which took on the force of federal law once approved by EPA. 42 U.S.C. § 7604. It is as if the CAA itself had been amended to include this new responsibility to develop a broader alternative procedure.

This Court has "regularly applied intervening statutes conferring . . . jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf v. USI Film Products, et al.*, 511 U.S. 244, 273 (1994) (citations omitted). In *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604 (1978), the failure to allege $10,000 in controversy at the commencement of an action was once a fatal defect at the time of filing, mandating dismissal, but became "of no moment" to the reviewing court following passage of a statute, pending the appeal, that eliminated the requirement. Similarly, in *United States v. Alabama*, 362 U.S. 602 (1960), the Justice Department's voting discrimination action brought against Alabama was properly dismissed by the district court, given that the Civil Rights Act of 1957 did not provide for such an action against a state. The dismissal was affirmed by the Court of Appeals for the Fifth Circuit. However, shortly before this Court heard the case, Congress passed the Civil Rights Act of 1960 which expressly allowed for such an action. In allowing the United States to proceed with its law suit, this Court held that "[u]nder familiar principles, the case must be decided on the basis of law now controlling."[3] *Id.*, 362 U.S. at 604.

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3. Notably, this Court did not reach or intimate any view upon the merit of the case or any defenses, but merely allowed the U.S. to continue with its action in Federal Court. *Id.*

Here, the "law now controlling" has changed because of the City's Redesignation Request. Pursuant to the CAA, in conjunction with the 1992 SIP, the City has now incurred a substantially broader obligation and responsibility under federal law. The law has clearly changed while this case was on appeal, and the lower court has stubbornly refused to recognize this change, instead prejudging on the merits based upon out-of-date assumptions. Plaintiffs deserve the opportunity to obtain discovery reflecting the City's action or inaction in carrying out its new responsibilities under the SIP.

When an intervening change occurs in the underlying facts and law, and that change will affect the outcome of a case pending appeal, the Court is bound to consider such change. *State Tax Commission, et al. v. Van Cott*, 306 U.S. 511, 516 (1939) ("in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered") (quoting *Patterson v. Alabama*, 294 U.S. 600, 607). There can be little doubt that "[i]ntervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered." *Vandenmark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 542-43 (1941). For the same reason, the Court of Appeals could not affirm the judgment of the district court "for substantially the same reasons stated in its opinion," App. A at 6a, when the pertinent reasoning was explicitly based on a fact, cited by the district court (*i.e.*, no request yet for redesignation), that ceased to be true while the appeal was *sub judice*.

In sum, the proposed amended complaint should be reinstated, and the case should be remanded to the district court to permit discovery to take place on plaintiffs' allegations.

II.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE SECOND CIRCUIT'S REQUIREMENTS FOR CITIZEN SUITS. (Question 3)

The court below erred in affirming the district court's finding that the cited provisions of the 1992 New York CO SIP do not contain a "specific strategy" as required in citizen suits. Review of predicted growth indicators, vehicle miles traveled and traffic studies conducted by the State in a variety of areas and intersections, potentially including some not examined in the EIS, are all "specific strategies" and commitments within the meaning of the Clean Air Act citizen suit provision, 42 U.S.C. § 7604(f)(3), and the cases discussing such strategies, *see, e.g.*, *Wilder v. Thomas*, 854 F.2d at 613. The CAA broadly provides that:

> any person may commence a civil action on his own behalf — (1) against any person . . . who is alleged to be in violation of (A) *an emission standard or limitation* under [the CAA]. . . .

42 U.S.C. § 7604(a)(1) (emphasis added). The CAA defines an "emission standard or limitation" as, *inter alia*:

> (3) . . . any condition or requirement under an *applicable implementation plan relating to transportation control measures, air quality maintenance plans*, vehicle inspection and maintenance programs or vapor recovery requirements . . .

> (4) any other standard, limitation, or schedule established . . . under any applicable State implementation plan approved by the Administrator, . . . which is in effect . . . under an applicable implementation plan.

42 U.S.C. § 7604(f)(3). *Wilder*, 854 F.2d at 614; *Coalition*, 967 F.2d at 769.

The State's CO Redesignation Request filed in August 1999 is an "air quality maintenance plan" that, as the district court held would happen, triggered the broader review procedure for potential CO hot spots, which petitioners properly alleged in the Fourth Claim of the proposed amended complaint; the Redesignation Request contains several "specific strategies" to obtain and maintain compliance with the CO standard.

Thus, on remand to the district court for its review of the adequacy of the proposed pleading, the court would have to review this allegation of violation by the City of the "specific strategy" in question, namely, a "broader alternative procedure" as required by the 1992 SIP.[4] Under the facts as they exist now, the Fourth Claim clearly states a claim upon which relief may be granted.

---

4. ¶ 87, the Fourth Claim, alleges in pertinent part that "Defendants violated two specific strategies set forth in . . . the SIP [including] Section 4.4 [which] commits the City to develop a broader alternative procedure to identify *potential* areas at risk of exceedance of the CO standard." (Emphasis in original).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED DECEMBER 22, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

* * *

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 22nd day of December, one thousand nine hundred and ninety-nine.

Present: PIERRE N. LEVAL
GUIDO CALABRESI
ROBERT A. KATZMANN,

Circuit Judges

99-7403

COMMITTEE FOR ENVIRONMENTALLY SOUND DEVELOPMENT, INC., NORTH RIVER COMMUNITY ENVIRONMENTAL REVIEW BOARD, WEST VILLAGE COMMITTEE, COALITION FOR A LIVABLE WEST SIDE, GEORGIO CAVAGLIERI, JOHN L. BUNCH, JR., PHYLLIS GUNTHER, HARRIET WEISSBERGER, and OLIVE FREUD,

Plaintiffs-Appellants,

Appendix A

THE CITY OF NEW YORK, RUDOLPH GIULIANI, as Mayor of The City of New York, THE METROPOLITAN TRANSPORTATION AGENCY, and TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Defendants-Appellees,

* * *

Appeal from the United States District Court for the Southern District of New York (Shirley Wohl Kram, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is **AFFIRMED**.

This matter concerns the proposed redevelopment of the area currently occupied by the New York Coliseum, located on the "superblock" bounded by West 58th Street, West 60th Street, Ninth Avenue and Columbus Circle in New York, New York. Plaintiffs are individuals, and community organizations representing individuals, who claim that they will be adversely impacted by alleged increases in carbon monoxide ("CO") levels caused by, or in the vicinity of, this redevelopment project.

The Clean Air Act (CAA), 42 U.S.C. §§ 7409 *et seq.*, requires the EPA to promulgate national ambient air quality standards (NAAQS) for various pollutants. Each State then determines how to achieve and maintain these standards by devising a State Implementation Plan (SIP). *See* 42 U.S.C.

§ 7410. The citizen suit provision of the CAA creates a private right of action to enforce the Act's provisions. A citizen may bring a suit to enforce: (1) a specific provision of the CAA; or (2) a specific provision of an applicable SIP. *See* 42 U.S.C. § 7604; *see also Wilder v. Thomas*, 854 F.2d 605, 613 (2d Cir. 1988). New York State's current SIP was promulgated in 1992 and replaced a SIP promulgated in 1984. The SIP specifies the use of environmental impact statements (EIS) to evaluate projects that may significantly impact environmental quality. *See Coalition Against Columbus Ctr. v. City of New York*, 967 F.2d 764, 767 (2d Cir. 1992).

Plaintiffs filed a complaint in January 1998 alleging violations of the CAA and New York's Uniform Land Use Review Procedure (ULURP), N.Y. City Charter § 197-c, based upon alleged exceedances of the CO NAAQS ("CO standard") in the vicinity of the site. An amended complaint followed in February 1998. In an unpublished opinion and order, the district court concluded pursuant to Fed. R. Civ. P. 12(b)(6) that plaintiffs had failed to state a federal claim upon which relief could be granted, and therefore declined to exercise supplemental jurisdiction over the state law claims. The court indicated that plaintiffs were free to submit a proposed amended complaint that "should identify, separately, each specific strategy or commitment in New York's SIP alleged to be violated and describe, with some particularity, the respects in which compliance with the provision is deficient. Thereafter, the Court will decide whether leave to amend shall be granted."

In December 1998, plaintiffs filed a proposed amended complaint purporting to identify defendants' violations of

sections 4.0(2) and 4.4 of the 1992 SIP. Section 4.0(2) of the 1992 SIP states in relevant part that:

> The [1984] SIP committed the State and City to:
>
> . . .
>
> 2. Follow a specified procedure for the ongoing identification and mitigation of hot spots. This procedure entailed a commitment by the City to review Environmental Impact Statements (EIS) and assure that any site at which an EIS identifies a violation or exacerbation of the carbon monoxide standard is brought into attainment of the standard.

Section 4.4 of the 1992 SIP declares in relevant part that:

> The 1984 SIP states ". . . if an EIS for a project identifies a violation or exacerbation of the carbon monoxide standard, then the City commits to assure that mitigating measures will be implemented . . . ."
>
> The City of New York will continue to follow the procedure for identifying potential exceedances resulting from new projects and/or disclosed in the environmental review process. The City will continue to assure that project sponsors or the City

> will mitigate potential exceedances caused by a project . . . .
>
> The State and City commit to develop a broader alternative procedure to identify potential areas at risk of exceedance of the CO standard, taking into account a wider database, consistent with all relevant methodologies, including: modeling, data collection and growth projection. This new procedure will become part of the CO Maintenance Plan which must be submitted at the time that the State requests redesignation of the nonattainment area as an area which has attained the NAAQS for CO.

In an unpublished opinion and order dated March 9, 1999, the district court denied plaintiffs leave to amend their complaint, concluding that the proposed amendments did not state a claim upon which relief could be granted. With regard to the alleged violations § 4.0(2), the court held that: (1) § 4.0(2) does not state a specific strategy or commitment upon which plaintiffs could base a suit because it is merely a description of the commitments outlined in the 1984 SIP; and (2) in any event, plaintiffs' underlying § 4.0(2) claim was based upon alleged exceedances not identified in the EIS.[2] As for § 4.4, the court held that: (1) plaintiffs' claim that the City violated this section by failing to mitigate "potential" exceedances did not state a cause of action

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2. The particular EIS for the redevelopment project at issue here is known as the "Final Supplemental Environmental Impact Statement."

because the EIS had not identified any such exceedances;[3] and (2) the City's obligation under the Section to develop "a broader alternative procedure to identify potential areas at risk of exceedance of the CO standard" is triggered by a request from New York State for redesignation of New York City as a "nonattainment area," an event which has not yet occurred. The court accordingly denied plaintiffs' motion to amend their complaint and dismissed the case.

When a district court has "found [a] proposed amended complaint legally insufficient and denied plaintiffs any opportunity to further amend their pleading . . . . [the] decision [is reviewed] as if the amended complaint had been filed and then subject[ed] to review under Fed. R. Civ. P. 12(b)(6)." *Wilder*, 854 F.2d at 613. A district court's dismissal of a complaint pursuant to Rule 12(b)(6) is reviewed *de novo*. *See, e.g.*, *Sykes v. James*, 13 F.3d 515, 518-19 (2d Cir. 1993).

On appeal, plaintiffs repeat many of the arguments made before the district court. With regard to these arguments, we agree with the judgment of the district court for substantially the same reasons stated in its opinion and summarized above.[4] The district court's opinion does not address

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3. To the extent plaintiffs allege that the preparation of the EIS in this case was flawed or inadequate, such a claim standing alone does not state a federal cause of action. *Cf. South Bronx Coalition for Clean Air, Inc. v. Conroy*, 20 F. Supp.2d 565, 570-71 (S.D.N.Y. 1998).

4. We note that, with respect to the holding that a portion of plaintiffs' claim under § 4.4 of the SIP is premature, we express no view on whether that claim may be brought at some later date.

plaintiffs' argument that § 4.4's language stating that "[t]he City of New York will continue to follow the procedure for identifying potential exceedances resulting from new projects and/or disclosed in the environmental review process" requires defendants to conduct an environmental review that goes beyond the EIS. We now reject this argument. When this isolated quote is read in context, it becomes evident that it merely refers back to § 3.6(A) of the 1984 SIP and does not mandate an environmental review process independent of an EIS in this case:

> *The 1984 SIP states* ". . . if an EIS for a project identifies a violation or exacerbation of the carbon monoxide standard, then the City commits to assure that mitigating measures will be implemented . . . ."
>
> The City of New York will *continue* to follow *the* procedure for identifying potential exceedances resulting from new projects and/or disclosed in the environmental review process. The City will *continue* to assure that project sponsors or the City will mitigate potential exceedances caused by a project. Exceedances *identified in the environmental review process* which are not caused by the project will be subject to appropriate control measures.

(emphasis added).

Nor does the district court's opinion address plaintiffs' argument that under § 4.4 they need only allege a mere

exacerbation of CO levels, as opposed to an *exceedance* of the CO standard, in order to state a cause of action. It seems clear to us that under this provision the City's obligation to mitigate CO levels is triggered only where an exceedance of the CO standard is created or an already existing exceedance is exacerbated, not where CO levels increase but stay below the standard. To hold otherwise would establish an entirely standardless obligation, requiring mitigation for *any* increase in CO levels. Plaintiffs' argument on this point is without merit.

Accordingly, for the foregoing reasons, the judgment of the district court is affirmed.

FOR THE COURT:

KAREN GREVE MILTON,
Acting Clerk

By: s/ Ralph A. Anderson
RALPH A. ANDERSON,
Deputy Clerk
ACTING OPERATIONS
MANAGER

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 9, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

98 Civ. 272 (SWK)

COMMITTEE FOR ENVIRONMENTALLY SOUND DEVELOPMENT, INC., NORTH RIVER COMMUNITY ENVIRONMENTAL REVIEW BOARD, WEST VILLAGE COMMITTEE, COALITION FOR A LIVABLE WEST SIDE, GEORGIO CAVAGLIERI, JOHN L. BUNCH, JR., PHYLLIS GUNTHER, HARRIET WEISSBERGER, OLIVE FREUD,

Plaintiffs,

-against-

THE CITY OF NEW YORK, RUDOLPH GIUILIANI AS MAYOR OF THE CITY OF NEW YORK, THE METROPOLITAN TRANSPORTATION AUTHORITY, and TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Defendants.

ORDER

SHIRLEY WOHL KRAM, U.S.D.J.

In this action alleging violations of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq.*, and the New York City Uniform Land Use Review Procedure ("ULURP"), N.Y. City

Charter § 197-c, in connection with the redevelopment of the area currently occupied by the New York City Coliseum (the "Coliseum site")[1], plaintiffs move, pursuant to Federal Rule of Civil Procedure 15(a), to amend their complaint. For the reasons set forth below, the motion is denied and the action is dismissed.

On December 1, 1998, having determined that plaintiffs' complaint failed to state a claim on which relief may be granted, plaintiffs were granted an opportunity to prepare a proposed amended complaint, pursuant to Federal Rule of Civil Procedure 15(a) .[2] On December 23, 1998, plaintiffs filed a proposed amended complaint that purports to identify violations of specific strategies and commitments in New York's State Implementation Plan, New York State Air Quality Implementation Plan for Control of Carbon Monoxide and Hydrocarbons in New York City Metropolitan Area (Jan. 1984) ("1984 SIP"); New York State Implementation Plan, Carbon Monoxide Attainment Demonstration New York Metropolitan Area (Nov. 1992) ("1992 SIP").[3]

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1. The subject of this action is the former New York City Coliseum, an office building and a parking garage located on the "superblock" bounded by West 58th Street, West 60th Street, Ninth Avenue and Columbus Circle in New York, New York.

2. The background of this case is set forth more fully in the Court's December 1, 1998 Memorandum Opinion and Order ("December 1998 Order"), familiarity with which is presumed. Only those facts related to the disposition of the instant motion are discussed below.

3. Pursuant to the CAA, each state determines how to achieve and maintain national ambient air quality standards ("NAAQS") by devising a State Implementation Plan.

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Federal Rule of Civil Procedure 15(a) provides, in part, that once a responsive pleading has been served, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The decision to grant or deny leave to amend lies within the Court's discretion. *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227 (1962). In this case, the Court is guided by the standards of Federal Rule of Civil Procedure 12(b) in deciding whether leave to amend shall be granted.

In evaluating a complaint under Rule 12(b), the Court must accept the allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686 (1974); *Easton v. Sundram*, 947 F.2d 1011, 1014-15 (2d Cir. 1991), *cert. denied*, 504 U.S. 911 (1992). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99 (1957). In its December 1998 Order, to avoid dismissal of the complaint, the Court directed plaintiffs to identify, separately, in their proposed amended complaint "each specific strategy or commitment in New York's SIP alleged to be violated and describe, with some particularity, the respects in which compliance with the provision is deficient." December 1998 Order at 11.

Plaintiffs' proposed amended complaint rests on alleged violations of two sections of the 1992 SIP. Specifically, plaintiffs allege that the City of New York has violated Sections 4.0(2) and 4.4. Section 4.0(2) of the 1992 SIP states:

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The [1984] SIP committed the State and City to:

> . . .
>
> 2. Follow a specified procedure for the ongoing identification and mitigation of hot spots. This procedure entailed a commitment by the City to review Environmental Impact Statements (EIS) and assure that any site at which an EIS identifies a violation or exacerbation of the carbon monoxide standard is brought into attainment of the standard.

1992 SIP, § 4.0(2). Section 4.0(2) is simply part of the 1992 SIP's description of the committments outlined in the 1984 SIP. Section 4.0(2) does not contain its own specific strategy or commitment on which plaintiffs' suit may rest. Furthermore, underlying plaintiffs' Section 4.0(2) claims are essentially the same arguments about "hot spots" found insufficient in plaintiffs' original complaint. *See* December 1998 Order, at 15-16.

Section 4.4 of the 1992 SIP states, in relevant part:

> The City of New York will continue to follow the procedure for identifying potential exceedances resulting from new projects and/or disclosed in the environmental review process. The City will continue to assure that project sponsors or the City will mitigate potential

> exceedances caused by a project . . . . The State and City commit to develop a broader alternative procedure to identify potential areas at risk of exceedance of the CO standard, taking into account a wider database, consistent with all relevant methodologies, including: modeling, data collection and growth projection. This new procedure will become part of the CO Maintenance Plan which must be submitted at the time that the State requests redesignation of the nonattainment area as an area which has attained the NAAQS for CO.

1992 SIP, § 4.4. Plaintiffs argue that defendants have violated Section 4.4 by failing to mitigate potential exceedances. Specifically, plaintiffs argue that the City's has failed to implement an enhanced motor vehicle inspection and maintenance program and failed to develop an alternative procedure to identify potential areas at risk of exceeding the NAAQS standard. However, an explained extensively in the December 1998 Order, the environmental review process has not identified any exceedances that will be caused by redevelopment of the Coliseum site. *See* December 1998 Order, at 12-13.[4] Accordingly, the redevelopment of the Coliseum site as outlined in the EIS does not trigger a mitigation obligation for the City. Furthermore, any alleged deficiencies in the environmental review process are not

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4. Plaintiffs' allegation that redevelopment of the Coliseum site will result in a level of carbon monoxide close to the NAAQS in the vicinity of the Coliseum site is also insufficient to state a claim under this section. *See* Proposed Amended Complaint, ¶ 65.

the proper subject of a citizen suit under the CAA.[5] *See* December 1998 Order at 14.

Nevertheless, plaintiffs argue that the City is obligated to develop a broader procedure for the identification of potential exceedances caused by a project than is currently used in the EIS process. However, the City's obligation to develop "a broader alternative procedure to identify potential areas at risk of exceedance of the CO standard" is a future one, which is triggered by a request from New York State for redesignation of New York City as a nonattainment area. 1992 SIP, § 4.4. Plaintiffs have not alleged that such a triggering event has occurred.

For the reasons set forth above and in the Court's December 1998 Order, plaintiffs' proposed amended complaint fails to state a claim on which relief may be granted. Accordingly, plaintiffs' motion to amend its complaint is denied and this action is dismissed.

SO ORDERED.

s/ Shirley Wohl Kram
SHIRLEY WOHL KRAM
UNITED STATES DISTRICT JUDGE

DATED: New York, New York
March 9, 1999

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5. Plaintiffs' assertion that the 1992 SIP enables citizen suits where a project sponsor has intentionally omitted a hot spot from their environmental review is unsupported and without merit.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 11, 2000

U.S. COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 11th day of February, two-thousand.

Present:

Hon. Pierre N. Leval

Hon. Guido Calabresi,

Hon. Robert A. Katzman,

CIRCUIT JUDGES.

Docket No. 99-7403

Committee for Environmentally
Sound Development, et al.,

Plaintiffs-Appellants,

v.

Appendix C

The City of New York, et al.

Defendants-Appellees,

Order

A petition for panel rehearing having been filed herein by The Committee for Environmentally Sound Development, et al.,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED**.

FOR THE COURT
KAREN GREVE MILTON,
Acting Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

APPENDIX D — STATUTORY PROVISIONS AND RULES INVOLVED

The pertinent part of the federal Clean Air Act, 42 U.S.C. §§ 7401, *et seq.*, is the citizen suit provision, 42 U.S.C. § 7604, which states in relevant part:

> any person may commence a civil action on his own behalf — (1) against any person . . . who is alleged to be in violation of (A) an emission standard or limitation under [the CAA]. . . .

42 U.S.C. § 7604(a)(1).

The CAA defines an "emission standard or limitation" as, *inter alia*:

> (3) . . . any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements . . . or
>
> (4) any other standard, limitation, or schedule established . . . under any applicable State implementation plan approved by the Administrator, ...

which is in effect . . . under an applicable implementation plan.

42 U.S.C. § 7604(f)(3)-(4).

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Federal Rule of Civil Procedure 12(b)(6) ("Defenses and Objections") provides in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted, . . .

Fed. R. Civ. P. 12(b)(6).

Federal Rule of Civil Procedure 15(a) ("Amended and Supplemental Pleadings") provides in pertinent part:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, . . . within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Fed. R. Civ. P. 15(a).

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Section 4.4 of the 1992 New York State Carbon Monoxide State Implementation Plan declares in relevant part that:

> The State and City commit to develop a broader alternative procedure to identify potential areas at risk of exceedance of the CO standard, taking into account a wider database, consistent with all relevant methodologies, including: modeling, data collection and growth projection. This new procedure will become part of the CO Maintenance Plan which must be submitted at the time that the State requests redesignation of the nonattainment area as an area which has attained the NAAQS for CO.

1992 New York CO SIP.